89-1113

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF NEW JERSEY

v.

LEROY HOWARD

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 89-1113

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STATE OF NEW JERSEY
vs.
LEROY HOWARD

} REPLY BRIEF

LEGAL ARGUMENT

POINT I THE UNITED STATES SUPREME COURT HAS JURISDICTION IN THIS MATTER.

This Court has jurisdiction in this matter because the New Jersey Appellate Division did not decide this matter on the basis of an adequate and independent state ground. The Appellate Division cited federal constitutional law, as well as New Jersey cases based on federal law. Moreover, given the narrow scope of the double jeopardy clause of the New Jersey Constitution, it is clear that the decision in this matter was based on federal law.

The State is appealing from the denial of its petition for certification by the New Jersey Supreme Court, which denied the petition without an opinion. Under these circumstances, it cannot be assumed that the New Jersey Supreme Court relied on non-federal grounds not specified in the Appellate Division opinion. *Cicenia* v. *Lagay*, 357 *U.S.* 504, 507, n.02, (1958).

At the trial level arguments (App. C-6 to 9; App. D-1 to 8), there was specific reference to federal constitutional law both by the court (App. D-1) and by the defendant (App. D-7 to 8). Moreover, the defendant's trial court brief relied on the

United States Constitution and numerous federal cases (App. E), which the trial court acknowledged (App. D-1). Thus, the federal constitutional issue was set up and claimed at the trial level, and the trial court considered federal law in rendering its decision.

The appellate briefs of the defense and the State relied on federal constitutional law (App. F & G). Thus, issue was joined in the Appellate Division on federal grounds. Likewise, in the New Jersey Supreme Court both the State and the defense relied on federal constitutional law, and issue was joined in that forum on federal grounds (App. H, I, & J).

The defendant argues that the Appellate Division's decision does not involve the Fifth or Fourteenth Amendments of the United States Constitution, and only involves *N.J.S.A.* 2C:1-9. The defendant completely leaves out any mention of the New Jersey or federal cases cited by the Appellate Division, or the cited New Jersey or federal constitutional provisions. However, the Appellate Division specifically cited and relied on the Fifth and Fourteenth Amendments of the United States Constitution (App. B-11) and *United States* v. *Perez*, 22 *U.S.* 579 (1824) (App. B-15). Thus, the New Jersey Appellate Division clearly relied on federal grounds in deciding this matter.

Moreover, the New Jersey cases cited by the Appellate Division (App. K) all rely on the federal constitution and federal cases in deciding the double jeopardy issue. Under *Michigan* v. *Long*, 463 *U.S.* 1032, 1039 (1983), the United States Supreme Court has jurisdiction if the state court relied on a state case which rested on federal grounds. Thus, this Court would have jurisdiction under that case.

Likewise, under *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 *U.S.* 562, 568, (1977), the United States Supreme Court has jurisdiction if the lower court opinion indicates that the state court felt compelled by federal constitutional considerations to apply state law as it did. In this case, it is clear that the Appellate Division did feel compelled by federal constitutional considerations to apply New Jersey law as it did, given its citations to and reliance on the Fifth and

Fourteenth Amendments of the United States Constitution and the case of *U.S.* v. *Perez*, *supra*, as well as reliance on New Jersey cases resting on federal grounds.

In *Turner* v. *Louisiana*, 379 *U.S.* 466, 470-471 (1964), this Court held that although the state supreme court's opinion was cast in terms of State law, that court's affirmance of the defendant's conviction necessarily rejected the defendant's federal Fourteenth Amendment claim. Likewise, in the instant case, the Appellate Division's decision necessarily adjudicated the defendant's federal constitutional rights.

Whether the case involves a federal question is itself a federal question. *Henry* v. *Mississippi*, 379 *U.S.* 443, 447, (1965). Likewise, in *Allied Stores, Inc.*, v. *Bowers*, 358 *U.S.* 522, 525 (1959), this Court held:

> It is settled that "[w]hether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and it is not concluded by the view taken of them by the state court." *First National Bank* v. *Anderson*, 269 *U.S.* 341, 346, *Staub* v. *City of Baxley*, 355 *U.S.* 313, 318.

In deciding the waiver issue against the State, the Appellate Division specifically cited *N.J.S.A.* 2C:1-9d(1) (App. B-13). However, in setting up the discussion of that statutory provision, the Appellate Division cited the Fifth and Fourteenth Amendments of the United States Constitution, as well as the double jeopardy clause of the New Jersey Constitution and several New Jersey cases decided on the basis of federal grounds (App. B-11 to 12). Thus, the question of whether a federal right had been waived was considered by the Appellate Division.

The procedure for waiving a federal right is a federal question, according to *Parker* v. *Illinois*, 333 *U.S.* 571, 574 (1948), which held:

> When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designated by a State for their protection constitutes a waiver of them. *Davis* v. *O'Hara*, 266 *U.S.* 314; *Central Union Co.* v. *Edwardsville, supra* (269 *U.S.* 190 (1925)).

On this same point see also *Henry* v. *Mississippi*, 379 *U.S.* 443 (1965).

Moreover, the United States Supreme Court has the supreme power to determine the procedure whereby federal rights are protected. Thus, in *Colorado* v. *Connelley*, 479 *U.S.* 157, 167-169 (1986) and *Lego* v. *Twomey*, 404 *U.S.* 477, 488 (1972), this Court decided that the voluntariness of a confession must be proved by state prosecution authorities by a preponderance of the evidence, contrary to the holdings of state courts that it must be proved by clear and convincing evidence (*Connelley*) or beyond a reasonable doubt (*Lego*). Likewise, in *Crist* v. *Bretz*, 437 *U.S.* 28 (1978), this Court held that a Montana statute was unconstitutional because it provided that jeopardy attached in a jury trial when testimony was taken from the first witness rather than at the swearing of the jury, which is the federal rule.

Furthermore, the waiver issue was not dispositive. Having decided that issue, the Appellate Division then had to decide the issue of whether there was a manifest necessity to declare a mistrial. In considering this issue, the court cited and considered the case of *United States* v. *Perez, supra* (App. B-15). Also, in setting up the discussion with respect to the manifest necessity issue, the court cited the *United States Constitution*, Amendments V and XIV, and several New Jersey cases which were based upon federal constitutional law (App. B-11 to 12).

It should be further noted that the State of New Jersey in the year 1947 adopted a constitution which contained the following provision on the subject of double jeopardy: "No

person shall, after acquittal, be tried for the same offense." *New Jersey Constitution*, Article 1, § 11. This provision is much narrower than the federal provision, which provides, in pertinent part, "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..." *United States Constitution*, Amendment V.

Accordingly, it is apparent that the Appellate Division's decision, since it does not deal with a case which has already resulted in acquittal, cannot be based directly on the New Jersey Constitution. Moreover, any reliance on *N.J.S.A.* 2C:1-9d is ultimately grounded on federal law. The Appellate Division in the instant case cited *State In The Interest of D.P.*, 232 *N.J. Super.* 8, 13-14, 56 *A.*2d 335 (App. Div. 1989), in which the Appellate Division stated that in adopting *N.J.S.A.* 2C:1-9, the New Jersey Criminal Code adopted the test set forth in *State* v. *Romeo*, 43 *N.J.* 188, 195-196, 203 *A.*2d 23 (1964), *cert.* den. 379 *U.S.* 970 (1965). In *State* v. *Romeo*, *supra*, at 195-197, the New Jersey Supreme Court relied on *State* v. *Locklear*, 16 *N.J.* 232, 108 *A.*2d 436 (1954), and went on to state, at 43 *N.J.* 196, as follows:

> Indeed the criteria just referred to as announced in *Locklear*, *supra* (16 *N.J.* 232), were expressly based upon the principles laid down by Mr. Justice Story in the leading case of *United States* v. *Perez*, 9 *Wheat.* 579, 580, 6 *L.Ed.* 165 (1824)...

Thus, it is apparent that any New Jersey court decision barring re-trial in a case which did not proceed to the point of acquittal must necessarily be based on the federal constitution and case law, whether directly or through the medium of New Jersey cases decided on the basis of federal cases and principles. Likewise, even a decision based on *N.J.S.A.* 2C:1-9d is in turn based on federal cases or on state cases which are based on federal principles. Therefore, this Court has jurisdiction under *Michigan* v. *Long*, *supra*, and *Zacchini* v. *Scripps-Howard Broadcasting Co.*, *supra*.

Likewise, when the non-federal ground is so interwoven with the federal ground that it is not an independent matter,

the jurisdiction of this Court is apparent. *Abie State Bank* v. *Bryan*, 282 *U.S.* 765, 773 (1931).

In response to the State's charges that the New Jersey courts deliberately ignored United States Supreme Court and Federal Circuit Court decisions which would have yielded a different result on the double jeopardy issue, the defendant has argued that the New Jersey Appellate Division did not mention the federal cases because it was deliberately deciding this matter solely on the basis of New Jersey law. However, this argument fails on two grounds.

To begin with, the Appellate Division not only ignored federal cases, but ignored the New Jersey case of *State* v. *Blanks*, 190 *N.J. Super.* 269, 463 *A.*2d 359 (App. Div. 1983), an opinion written by one of the members of the present panel. The *Blanks* case, which was based on federal and state law, should have controlled in this situation, but the State's citation of it was not even acknowledged by the Appellate Division, which did not discuss or distinguish *Blanks*.

Secondly, the Appellate Division did cite the *United States Constitution*, Amendments V and XIV, and *U.S.* v. *Perez*, *supra*, in reaching its decision. Thus, it does not make any sense to say that the Appellate Division deliberately ignored *Arizona* v. *Washington*, *Gori* v. *United States*, *United States* v. *Dinitz*, *United States* v. *Sedgwick*, and *United States* v. *Pridgeon*, (citations contained in Table of Authorities), in order to decide this matter solely on State grounds, when the Appellate Division clearly referred to other federal Constitutional sources.

Rather than intentionally omitting citations to federal cases in an effort to decide this matter solely on state grounds, the Appellate Division intentionally omitted citations to federal or state cases on point, in order to decide this matter in a way which suited their particular purpose in this case, which was inconsistent with the applicable state and federal law. The Appellate Division's action is especially significant in light of the United States Supreme Court decisions holding that a state ground may be considered inadequate if it is inconsistent with the earlier decisions of the state court.

Barr v. *City of Columbia*, 378 *U.S.* 146 (1964); *Indiana ex rel. Anderson* v. *Brand*, 303 *U.S.* 95 (1938); *Fox River Paper Co.* v. *Railroad Comm'n.*, 274 *U.S.* 651 (1927).

Finally, it is difficult to see how a state court can decide an issue of double jeopardy without taking into account the federal law on the subject. If the state court had decided, using no federal citations at all, that the defendant's double jeopardy rights would not be violated by a re-trial, the defendant would not be precluded from petitioning this Court for certiorari on the basis of federal rights, or precluded from filing a federal habeas corpus petition. Likewise, if the State seeks certiorari regarding the same decision, federal rights and law are just as involved as if the defendant had sought review. The State is just as entitled to have this Court determine whether federal rights were adjudicated properly as the defendant would be. *Benton* v. *Maryland*, *395 U.S.* 784 (1969).

POINT II THE DEFENDANT'S ARGUMENT FAILS ON SUBSTANTIVE GROUNDS.

The second point in the defendant's brief deals with the substantive arguments. The defendant upholds his introduction of improper comment in the opening statement by arguing that the State had expressed an intention to introduce the in-court identification made by Samuel Wilson in 1976. During pre-trial preparation, the State informed the defendant that it intended to introduce evidence of the in-court identification, as well as the on-scene identification. However, the State did not mention in-court identification during its opening statement. A subsequent review of New Jersey *Evidence Rule* 63(1)(c) indicated that the in-court identification would not be admissible at trial, since the court's incompetency ruling at that time would have made the statement inadmissible if made by Samuel Wilson in an attempt to testify in court at that time (1976). Nevertheless, the on-scene identification would be admissible under New Jersey *Evidence Rule* 63(4) as a spontaneous and contemporaneous statement, even though the witness was incompetent at the time it was made. *State In The Interest of C.A., a Juvenile*, 201 *N.J. Super.* 28, at 31-32 (App. Div. 1985).

In any event, whether the court had properly excluded the prior in-court identification or improperly admitted it, the prior incompetency ruling would have been irrelevant and inadmissible either for the purpose of attacking the prior in-court identification or attacking Samuel's credibility in general. Under New Jersey *Evidence Rule* 17(b), the incompetency ruling constitutes the inadmissible hearsay opinion of the judge that Samuel could not testify because his age made him incapable of understanding the duty of a witness to tell the truth. As a means of attack on present-day testimony, that opinion is irrelevant, because the limitations based on age no longer apply to an 18 year old. As a means of attacking the prior out-of-court identification, which would be admitted under New Jersey *Evidence Rule* 63(4) a prior incompetency determination would be irrelevant, because the testimony of witnesses to the identification would be admissible even if the identifying witness had been incompetent. *State In The Interest of C.A., a Juvenile, supra*, at 31-32. Finally, the incompetency ruling would not be admissible as a means of attacking even an erroneously admitted prior in-court identification, since prior findings of fact or rulings of law based on such findings of fact cannot be permitted to influence a jury's factual determination. *State* v. *Zamorsky*, 159 *N.J. Super.* 273, 387 *A.*2d 1227 (App. Div. 1978); *State* v. *Zamorsky*, 170 *N.J. Super.* 198, 200, 406 *A.*2d 192 (App. Div. 1979); *State* v. *Tirone*, 64 N.J. 222, 228, 314 *A.*2d 601 (1974); New Jersey *Evidence Rule* 8(3); *State* v. *Hampton*, 61 *N.J.* 250, 294 *A.*2d 23 (1972); *State* v. *Bowman*, 165 *N.J. Super.* 531, 398 *A.*2d 908 (App. Div. 1979); *State* v. *Humphrey*, 183 *N.J. Super.* 580, 444 *A.*2d 1135 (Law Div. 1982); *Arizona* v. *Washington*, 43 *U.S.* 497, 510-511 (1978).

It is improper to refer a trial jury to prior factual determination according to *State* v. *Blanks*, 190 *N.J. Super.* 269 (App. Div. 1983), where the court observed:

> The State and defendant equally have an interest in exclusion of improper evidence. Here we have a witness who with deliberation was seeking the opportunity to intrude the determination of another jury into this case. (190 *N.J. Super.* at 278.)

Thus, the defendant defends his attempt to introduce irrelevant evidence regarding the incompetency ruling by assuming that the State would attempt to and would secure an incorrect ruling admitting inadmissible evidence regarding the in-court identification. This is no justification for attempting to introduce irrelevant evidence regarding the incompetency ruling and prior proceedings, especially since the State had not mentioned the in-court identification in its opening statement, had not attempted to introduce it in any way, had not sought or received any pre-trial ruling admitting it, and would have been foreclosed from introducing it by New Jersey *Evidence Rule* 63(1)(c).

The defendant also argues that the propriety of an evidence ruling is a state law matter, and should not be reviewed by this Court. However, this is a state law matter which is critical to the determination of whether or not the defendant's federal rights would be violated by a re-trial. When a mistrial was granted because the defense referred to evidence inadmissible under state law, a re-trial would not violate the defendant's double jeopardy rights. The admissibility under state law of evidence which the defense attempted to introduce was considered by this Court in *Arizona* v. *Washington*, 434 *U.S.* 497, 499-500, fn.3, 510-511, 521 (1978). The inadmissibility of the evidence under Arizona law was the primary reason that this Court ruled that a re-trial would not be barred in that case.

The defendant also argues that under *U.S.* v. *Sedgwick*, 345 *A.*2d 465 (D.C. App. 1975), if a mistrial even happens to have the effect of helping the prosecution, re-trial is barred. This is clearly not the holding of that case. The court merely noted that the trial court had tried to aid the defense rather than the prosecution.

In the defendant's Statement of Facts, he mentions that he passed an unstipulated polygraph examination in 1976. Under New Jersey law, the results of an unstipulated polygraph test are not admissible into evidence. *State* v. *McDavitt*, 62 *N.J.* 36, *A.*2d (1972). The State vehemently objects to having the defendant introduce the issue of the polygraph test before this Court, since it is inadmissible and

irrelevant in any stage of a New Jersey proceeding. The defendant has repeatedly attempted to introduce this, at oral argument before the New Jersey Appellate Division on a prior appeal, and in his Appellate Division and New Jersey Supreme Court briefs on the present appeal. Hence we have, right in the context of the defendant's brief, an indication of his attitude and behavior with respect to the introduction of improper evidence. As if more proof were needed besides the record in the trial court, the defendant has incorporated into his brief before this Court an attempt to introduce evidence inadmissible at trial under New Jersey law. It is no more proper for defendant to do this than it would be for the State to introduce in its case in chief the fact that the defendant was convicted in 1989 of aggravated assault charges as a result of his having stabbed his current girlfriend. Both matters would be irrelevant.

CONCLUSION

On the basis of the foregoing arguments, it is respectfully submitted that the United States Supreme Court has jurisdiction to consider this matter. It is further respectfully submitted that a Writ of Certiorari should issue to review the decisions of the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court.

Respectfully submitted,

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BY: /s/ JOHN A. MENNITE
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DATED: FEBRUARY 8, 1990

APPENDIX E

AUTHORITIES CITED IN DEFENDANT'S TRIAL COURT BRIEF

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Serfass v. *United States*, 420 *U.S.* 377 (1975)

Crist v. *Bretz*, 437 *U.S.* 28 (1978)

Wade v. *Hunter*, 336 *U.S.* 684 (1949)

United States v. *Jorn*, 400 *U.S.* 470 (1971)

United States v. *Perez*, 22 *U.S.* 579 (1824)

United States v. *Coolidge*, 25 *Fed. Cas.* 622

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